STATE OF MICHIGAN

COURT OF APPEALS

FINKEL ROTH GROUP IV, L.L.C.,

Plaintiff/Counter Defendant-Appellant,

v

LIBRALTER PLASTICS, INC.,

Defendant-Appellee,

and

NYX, INC. and 1000 MANUFACTURERS DRIVE PROPERTIES, L.L.C.,

Defendants/Counter Plaintiffs Appellees.

UNPUBLISHED
October 6, 2005

No. 261892
Wayne Circuit Court
LC No. 03-320019-CZ

Before: Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants summary disposition. We affirm.

This case arose from a failed real estate purchase. Plaintiff sought to buy improved commercial property that Libralter Plastics, Inc. owned and leased to NYX Incorporated. However, a clause in NYX's lease provided it with an option to purchase the property at a set price and a right to match any legitimate lower offer. Of course, the clause also required Libralter to give NYX notice of any legitimate offer before Libralter sold the property to an outsider and provided NYX with a ten-day time limit for responding to an outside offer. On September 17, 2002, plaintiff sent Libralter an offer. Libralter notified NYX of the offer on October 28, 2002, in a cursory letter. NYX never responded, so plaintiff and Libralter entered into a purchase agreement, which fell through when plaintiff discovered problems with the roof on the property's building and Libralter refused to budge on price. Nevertheless, the ill-fated bargain received new life when plaintiff and Libralter negotiated and executed an amended agreement for a lower price, at which time NYX predictably asserted that Libralter failed to provide it with adequate notice of any offer and asserted its desire to exercise its purchase option. After a failed attempt to procure NYX's waiver of the option, plaintiff allowed the closing date

to pass without paying the purchase price or otherwise finalizing the transaction, and plaintiff's deposit was returned. Subsequently, NYX formed defendant 1000 Manufacturers Drive Properties, L.L.C., and assigned the purchase option to it. Libralter sold the property to Manufacturers, and plaintiff filed suit a week later.

The crux of plaintiff's complaint is that defendant Libralter breached the amended purchase agreement by failing to properly notify NYX of plaintiff's offers to buy the property. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Neither the first purchase agreement nor the second amended purchase agreement between plaintiff and Libralter required Libralter to ensure that NYX received notice of plaintiff's offer to purchase the property. Therefore, plaintiff fails to demonstrate how Libralter violated any affirmative duty it owed plaintiff under the contract. Furthermore, plaintiff fails to demonstrate that Libralter misrepresented, intentionally or otherwise, its ability to produce clear title at closing. While a clause in the amended agreement required Libralter to produce a title that was free from objection (or at least insured against any objection), the clause merely allowed plaintiff the remedy of terminating the agreement if Libralter failed to do so. Plaintiff opted for this alternative, so it may not now rely on the very agreement it chose to terminate.[1]

Further, plaintiff fails to demonstrate why it should recover under the terms of the lease between Libralter and NYX. Plaintiff was not a party to the lease, so plaintiff's recovery is predicated on its potential status as a third-party beneficiary. "A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person." MCL 600.1405(1). Our Supreme Court has interpreted this statute to mean that incidental beneficiaries lack the authority to enforce a contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). Rather, a non-party may only enforce a contract "when that contract establishes that a promisor has undertaken a promise 'directly' to or for that person." *Id.* at 428. There is no evidence that Libralter and NYX specifically intended to directly benefit plaintiff when they entered into their lease agreement, so plaintiff has no claim based on any breach of the lease.

Plaintiff also argues that the trial court erred by granting summary disposition to NYX on plaintiff's claims of tortious interference with a business relationship. We disagree. "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate

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[1] We are unwilling to enter into a discussion about whether Libralter provided NYX with adequate notice. If plaintiff wanted to litigate this issue, it should have bought the property and faced suit from NYX. Then it could have legitimately requested indemnity from Libralter for failing to provide it with good title. But plaintiff may not, however wisely, back out of the transaction and then sue for the costs of discovering its risks.

the unlawful purpose of the interference." *CMI Int'l, Inc v Interment Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996).

Plaintiff fails to present any evidence that NYX committed any per se wrongful act or had an overriding improper purpose for its actions. The basis for plaintiff's tortious interference claims is NYX's refusal to sign an estoppel certificate and subordination agreement. Plaintiff argues that Section 20 of NYX's lease with Libralter required NYX to execute the documents. We disagree. Section 20 of the lease only required NYX to execute "commercially reasonable instrument(s) as shall be desired by Landlord's lender." Because plaintiff was not Libralter's lender, the premise of plaintiff's argument fails. Moreover, NYX persuasively argues that it refused to execute the documents for legitimate business reasons, namely because signing the documents would have forfeited NYX's right to challenge whether it received proper notice of plaintiff's purchase offer and would have waived NYX's right to purchase the building under the terms set forth in Section 37 of the lease. Further, Section 20 allowed NYX to challenge the accuracy of the documents before signing them, and NYX timely challenged them. Therefore, Section 20 did not require NYX to complete the documents. Because plaintiff failed to present any evidence of specific, affirmative acts that showed an overriding improper purpose, summary disposition was appropriate. *BPS*, *supra*.

Affirmed.

/s/ Karen Fort Hood
/s/ Peter D. O'Connell